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Supreme Court of the United States

No. 631

WALTER E. ALLEN,
Petitioner,
VERSUS
M. LUCILLE ALLEN,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO OKLAHOMA SUPREME COURT

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APRIL, 1949.

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RESPONSE TO PETITION

In response to the Petition for Writ of *Certiorari*, we respectfully urge that said petition should be denied:

(a) The laws of the forum control where the laws of the sister state are not pleaded or proven to be contrary.

(b) A *nunc pro tunc ex parte* order of the Nevada trial court is void, where obtained by an Oklahoma husband without notice to an Illinois wife, six years after

husband has obtained a decree of divorce from wife in the Nevada Court.

(c) A second suit was pending in the Oklahoma trial court on the contract for the accrued installments due after the first judgment, when the husband caused the contract to be incorporated in the Nevada divorce decree without notice to the wife (Tr. 124).

(d) Such void order incorporated a contract of the husband to pay his wife monthly installments for life, after the Supreme Court of Oklahoma had decided that such contract had not been merged in the Nevada divorce decree and was a valid obligation of the husband.

Allen v. *Allen*,
196 Okla. 36, 162 Pac.(2d) 193.

STATEMENT

A review of the Record of this case as shown by the Transcript and the exhibits attached to the jurisdictional statement shows that the wife, the respondent, was a resident of the State of Illinois; that on August 4, 1939, they entered into a contract in full settlement of all property rights of the parties; that the husband filed suit for divorce in Nevada on August 10, 1939, a local attorney appearing for the wife, and that such divorce was granted on August 10, 1939. The trial court of Nevada in entering the decree for divorce for the husband approved the contract under a form of Journal Entry which is commonly used in that state granting a divorce and stated:

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> "It is further ordered that the agreement between the parties hereto, dated August 4, 1939, be, and it is hereby approved, adopted and confirmed by this court, and the parties hereto directed to comply therewith and to execute the terms thereof."

It did not contain any portion of the terms of the agreement, or show that the husband was required to pay the wife monthly installments of $140.00 during her lifetime. (*Allen* v. *Allen*, 196 Okla. 36, Exhibit 3, Petitioner's Statement).

The wife became bound by the divorce decree, but as the contract was not merged in the decree, she was entitled to and in fact required to pursue her remedy under the contract against her husband where she could find him. The husband moved to Oklahoma shortly after obtaining the divorce in Nevada and being in default in the monthly payments, the wife filed the first suit on this contract in February, 1943. After service of summons was had, the husband set up the Nevada decree in his Answer, offered it in evidence, and the trial court held that the contract was merged in such decree. The Oklahoma Supreme Court in the wife's appeal reversed the trial court (*Allen* v. *Allen*, 196 Okla. 36), holding the rights of the parties could not be determined under the decree without referring to the contract, that the contract was not merged in the decree, and that the wife was entitled to a judgment for the installments accruing under the contract. The husband did not file a petition in this Court for a review of such decision of the Oklahoma Supreme Court, but paid the installments accruing up to and including December 31, 1945; neither

has he requested a review of the insurance phase of the contract as was decided in favor of the wife by the Oklahoma Supreme Court [*Allen* v. *Allen*, 201 Pac.(2d) 786].

The husband thereafter refusing to pay subsequent installments under the contract, the wife filed a second suit in the Oklahoma District Court on April 12, 1946. Personal service was had on the husband April 17, 1946 (Tr. 7-15). In his Answer (Tr. 18-29), filed May 13, 1946, he attached thereto an order, styled *Nunc Pro Tunc* entered by the Nevada trial judge April 29, 1946, which changed the divorce decree by stating (Tr. 35):

> "It is further ordered that the agreement between the parties hereto dated August 4, 1939, be, and it is hereby approved, adopted, ratified and confirmed by this court *and made a part of this decree and incorporated verbatim within the four corners thereof as follows*: * * *"

The contract was then copied in the decree, which further provided (Tr. 38):

> *"* * * and said contract is legally extinguished and merged into this decree and the parties are hereby directed to comply with the terms of this decree in lieu of said contract."*

[The italicized portion, as well as the contract were additional statements which did not appear in the original decree]. The petitioner admits (Tr. 48) that no notice was given the wife by the husband in obtaining this *ex parte* modification of the original Nevada divorce decree.

ARGUMENT AND AUTHORITIES

We have two distinctly different Nevada decrees here. The first did not provide for the payment of any money, or provide for anything except a divorce, so the contract was not merged therein. The wife was entitled to receive the monthly installments under the contract during her natural lifetime, and a suit thereafter could and must be maintained only in Oklahoma or wherever the husband could be found. The second Nevada decree provides for the payment of money, merges the contract therein and reduces the wife's right to receive the monthly payments for her natural lifetime to a judgment which may be modified from time to time. See Petitioner's brief (Tr. 93) setting forth his reasons for objecting to pay under the contract and contending that alimony provided in a divorce decree ends upon the death of either the husband or wife; that payments imposed by separation contract may be impressed upon his estate, and that a separation contract cannot be modified or changed.

Stark v. *Stark*,
185 Okla. 348, 91 Pac.(2d) 1064;
Murphy v. *McElroy*,
185 Okla. 388, 92 Pac.(2d) 369.

Is not the omission of the incorporation of the contract in the first decree a matter of judicial discretion of the trial court? We believe it is the judicial discretion which is sustained in the Oklahoma Supreme Court *Allen opinions* and by *Elliott* v. *Dunham*, 191 Okla. 395, 130 Pac.(2d) 534, and cases cited therein. The trial court may approve the con-

tract as it was approved by the Nevada trial court in 1939; or disapprove it and enter a judgment that the Court may have determined to be fair and equitable; or approve a portion of such agreement and enter a judgment as to other matters as the court believed to be proper; or enter judgment as was entered by the Nevada court in its *ex parte nunc pro tunc* order in April, 1946, incorporating the agreement. If the wife did not agree with such judgment as entered, she had the right to appeal to the Supreme Court of Nevada; or if she agreed, she could accept the judgment without any fear of change without notice to her.

Certiorari will be exercised sparingly and only upon questions of gravity and importance.

United States v. *Johnston*,
268 U.S. 225, 69 L. ed. 925.

The writ will not be granted to review the evidence and discuss specific facts.

Southern Power Company v. *North Carolina Public Service Company*,
263 U.S. 508, 44 Sup. Ct. 164;
General Talking Pictures Corp. v. *Western Electric Company, Inc. et al.*,
304 U.S. 175, 58 Sup. Ct. 849.

Appellant has burden of affirmatively establishing United States Supreme Court's jurisdiction.

Republic Natural Gas Company v. *State of Oklahoma*, 334 U.S. 62, 68 S. Ct. 922.

The husband is not entitled to the benefits of the full faith and credit clause of the Constitution when he failed to prove that the laws of Nevada are different from the laws of Oklahoma.

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Western Life Indemnity Company v. *Rupp*, 235 U.S. 261.

He submitted the issues involved when he introduced the Nevada judgment as originally entered without offering or introducing any Nevada laws contrary to the laws of Oklahoma. Upon the reversal of the first trial of this case by the Supreme Court of Oklahoma, he became bound by such decision and the laws of Oklahoma, the state of his residence.

The laws of Oklahoma, the state of the forum, are controlling unless the petitioner pleads and proves the laws of Nevada to be different.

Mason v. *Pelkes* (Idaho, 1936), 59 Pac. (2d) 1087, *certiorari* denied by this Court 229 U. S. 615;

Hanley v. *Donoghue*, 116 U.S. 1.

A foreign divorce decree must be construed according to the laws of Oklahoma where there is no pleading or proof of the other state giving it any different effect.

Wilcox v. *Wilcox*, 198 Okla. 370, 178 Pac. (2d) 874;

Hinds et al. v. *Atlas Acceptance Corporation*, 178 Okla. 474, 63 Pac. (2d) 29.

The Nevada Supreme court has held that the laws of New York could not be presumed to be different from Nevada, where no proof was made.

Foy v. *Smith's Estate*, 81 Pac. (2d) 1065.

Change in husband's circumstances is not a defense to wife's suit for installments due under contract. That

part of the judgment of the trial court holding that the contract could be modified at a future date will be treated as surplusage.

Stark v. *Stark*,
185 Okla. 348, 91 Pac.(2d) 1064.

The full faith and credit clause does not require the court to enforce a void judgment. *Jacobson* v. *Russell*, 142 Okla. 181, 286 Pac. 299. In that case the defendant was not served with the process in the sister state in a suit to recover a money judgment.

See, also, *Allis Chalmers Mfg. Co.* v. *Lewelling*, 41 Pac.(2d) 1032, where the Kansas court held that a judgment of another state which did not have jurisdiction of the parties was void and could not be used as a defense in Kansas.

A judgment varying the rights of parties as fixed by any judgment is void. The court does not have power to enter a *nunc pro tunc* order incorporating a contract unless notice is given within six months after a judgment is returned. *Nunc pro tunc* order cannot be used to enlarge judgment as originally rendered or to correct judicial errors or omissions. *Finley* v. *Finley* (Nev., 1948), 189 Pac. (2d) 334. Rule 45 of the Nevada district court is set forth in this opinion:

> "No judgment * * * shall be vacated, amended, modified, or corrected by the court or judge rendering, making or ordering the same, unless the parties desiring such vacation, amendment, modification, or correction shall give notice to the adverse party of such motion thereof within six months after such judgment was rendered or made. * * *"

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The claim of denial of full faith and credit of a sister state's judgment is without merit where the effect of such judgment under the laws of the sister state was not brought to the attention of the court below.

Gasquet v. *Lapyre*,
242 U. S. 367;
Western Life Indemnity Company v. *Rupp*,
235 U.S. 261.

New York is only required to give a Florida judgment the same credit that Florida would give such judgment. A discretionary judgment such as alimony is not protected by the full faith and credit clause of the Constitution.

New York ex rel. Halvey,
330 U.S. 610.

Full faith and credit does not require recognition of a judgment of a sister state where the court was without jurisdiction to render such judgment, a judgment is subject to defense in the state of the forum.

Perkins v. *Benquet Consolidated Mining Co.*,
(Cal., 1942), 132 Pac. (2d) 70, *certiorari* denied by this Court 319 U.S. 774;
Wyman v. *Newhouse* (C.C.A. 2nd),
93 F. (2d) 313, *certiorari* denied by this Court 303 U.S. 664.

Want of jurisdiction over either the person or the subject matter is open to inquiry, and full faith and credit cannot be used to accommodate the personal whims of the parties where obtained in violation of the procedural due process without some form of notice.

Milliken v. *Meyer*,
311 U.S. 457;

Estin v. *Estin*,
334 U.S. 541, 68 S. Ct. 1213;
Griffin v. *Griffin*,
227 U.S. 220, 66 S. Ct. 556.

We are unable to find any court that has approved procedure which permits the husband to agree with the form of judgment only so long as the interpretation thereof is beneficial to him. The husband had his rights adjudicated in the first appeal to the Oklahoma Supreme Court, but instead of petitioning to this Court when the suit was adverse to him, he caused the Nevada court to change its decree to include the contract with the wife, after he had been sued the second time for accrued installments. This action on the part of the husband is detrimental to the rights of the wife as were determined by the Oklahoma court, of which state the husband is a citizen.

As was said in *Sherrer* v. *Sherrer*, 334 U.S. 343, at Page 348:

> "There is nothing in the concepts of due process which demands that plaintiff be afforded a second opportunity to litigate the existence of jurisdictional facts" (Citing cases).

Modification of a judgment being without legal notice is void.

Allen v. *Allen*, 196 Okla. 36.

See *Hirsh et al.* v. *Twyford et al.*, 40 Okla. 220, 139 Pac. 313:

> "Where the clerk has failed, neglected or declined to enter of record any order, judgment or decree of his court, the proper remedy is an application to that court, *upon notice to adverse parties*, for an order di-

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recting the omitted order, judgment or decree to be entered *nunc pro tunc.*"

For a *nunc pro tunc* order such as was entered in Nevada to be sustained, the position of the parties must not have been changed or affected thereby.

Tiger et al. v. *Coker et al.*,
180 Okla. 175, 68 Pac.(2d) 509.

"The *nunc pro tunc* order, having been made without notice to minor or his guardian, is void."

Lewis v. *Ward*,
101 Okla. 146, 223 Pac. 839.

The law of the forum prevails as to statute of limitations.

State of Ohio ex rel. v. *Porter* (Cal., 1942),
129 Pac.(2d) 691, *certiorari* denied by this Court 318 U.S. 757.

The petitioner admits that the wife had no notice of the later Nevada proceedings (Tr. 48). The reason for the institution of this void procedure after he had been sued and served with summons (Tr. 15), was that he might bring himself within the Statute of Limitations of Oklahoma, Title 12, Section 95:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

* * * * *

"Fourth. Within one year: An action on a foreign judgment; * * *"

He also attempted by the Nevada *ex parte nunc pro tunc* order to bring himself under the decisions of the Okla-

homa Court—*Finley* v. *Finley*, 174 Okla. 457, 50 Pac. (2d) 643, and *McRoberts* v. *McRoberts*, 177 Okla. 156, 57 Pac. (2d) 1175, decided in 1935, which hold that when an agreement to pay the wife monthly installments for life was set forth in the decree, it became merged therein; that a suit could not be maintained in Oklahoma on said decrees, as a decree for alimony payable in monthly installments is void.

CONCLUSION

The modified decree was introduced at the last trial by the husband over the objections of the wife (Tr. 49). No laws of Nevada were pleaded or introduced to support the husband's right to obtain the *ex parte* modification of a divorce decree without notice almost seven years after the original order was entered and during the time an action was pending between him and the wife in the State of Oklahoma (the forum selected by the husband to have these questions litigated). It was stipulated (Tr. 48) that no notice was given and that the laws of Nevada were the same as Oklahoma as to the authority of the trial court to approve or disapprove such contracts in divorce cases. This appeal or petition for writ of *certiorari* should be dismissed and the wife not be required to pursue her remedies further against the husband, and this litigation be finally ended.

We respectfully submit that the Record in this case conclusively shows that the petitioner is not entitled to a review of the judgment of the Oklahoma Supreme Court by this Court; that the full faith and credit clause of the

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Constitution is not properly invoked; that the modification by the Nevada court was void and was without due process, and was caused to be entered on the part of the petitioner in order that he might evade a contract entered into with his wife in Illinois, who was never a citizen or resident of the State of Oklahoma, and who was compelled to submit her rights under the laws of Oklahoma, the forum selected by the husband.

Respectfully submitted,

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